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In the Supreme Court of the United States

No. 72-6931

LAWRENCE GAY LIBERATION FRONT, et al.,
Petitioners,

vs.

THE UNIVERSITY OF KANSAS, E. LAURENCE CHALMERS, Individually and As Chancellor of the University of Kansas, and WILLIAM M. BALFOUR, Individually and As Vice-Chancellor of Student Affairs,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

VERN MILLER
Attorney General of the State of Kansas
EDWARD G. COLLISTER
Special Assistant Attorney General
1203 Iowa Street
Lawrence, Kansas

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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The decision of the United States Court of Appeal for the Tenth Circuit giving rise to the petition for certiorari in this case affirming a judgment in respondents' favor following a trial in the United States District Court for the District of Kansas which is set out and appears as Appendix B in the petition. The opinion and judgment of the United States District Court for the District of Kansas denying petitioners' requested relief following a trial is found in Appendix A of the petition.

STATEMENT OF FACTS

This action was filed in the United States District Court for the District of Kansas as a class action by various members of the Lawrence Gay Liberation Front, and other

students and employees of the University of Kansas, alleging themselves to be friends of the Lawrence Gay Liberation Front. The complaint requested injunctive relief, costs, and attorneys' fees against the University of Kansas, the then Chancellor of the University, Laurence E. Chalmers, and the Vice-Chancellor for Student Affairs, William M. Balfour. The complaint was filed after the latter two administrative officials of the University refused to grant "recognition" to the Lawrence Gay Liberation Front as a "recognized" student group or association.

There are two types of student groups or associations at the University of Kansas, "recognized" groups and "registered" groups. The Lawrence Gay Liberation Front is a registered student group, but not a recognized student group.

Together with the complaint, petitioners filed a motion for a preliminary injunction. At petitioners' request the motion for preliminary injunction and the trial on the merits were consolidated and tried at the same time in the District Court. Petitioners introduced *no evidence* in support of a motion for preliminary injunction *or in support of their complaint.* The exhibits attached to the complaint were not presented as evidence. The motion for preliminary injunction was denied. (See Vol. I, R. 64-65)* Ultimately the District Court ruled on the merits against petitioners. (Vol. I, R. 83-97) Respondents filed an answer denying in all significant particulars the allegations of the complaint.

The only evidence adduced at trial was from a witness for defendants-respondents, Mr. Charles Oldfather, who occupies an administrative position as University Attorney

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*Record references are to the record on appeal as indexed by the Clerk of the Court of Appeals.

for the University of Kansas. Mr. Oldfather was not, nor is he at the present time, counsel of record for any of respondents. Mr. Oldfather appeared solely as a witness.

Professor Oldfather testified that he was a professor of law and the University Attorney. (Vol. II, p. 3) He testified that there were three classifications of student groups at the University of Kansas:

(a) Recognized groups,

(b) Registered groups but non-recognized groups, and

(c) Neither recognized nor registered groups. (Vol. IV, p. 4)

To register, all a group need do is fill out a brief form and file it with a University official. (Vol. III, pp. 4-5) To be recognized, Professor Oldfather testified that the administration of the University had to make an affirmative recognition of the status of the organization as a "recognized" association or group. (Vol. III, p. 5) Professor Oldfather testified that the Lawrence Gay Liberation Front was a registered group, but had not been recognized. He testified that since the group was registered at the time he testified it would be listed in the new school directory, although it was not listed in the prior school directory because at that time it had not been registered. (Vol. III, pp. 6-7) During the time the group was not listed in the student directory it was listed at the University's Information Center. (Vol. III, p. 7) Professor Oldfather testified that the Lawrence Gay Liberation Front could rent office space in the Student Union Building, as could any other group, regardless of registration or recognition. (Vol. III, p. 8) Professor Oldfather testified that the Lawrence Gay Liberation Front could ask for and use meeting space in the Student Union Building. (Vol. III, p. 5) Professor Oldfather testified that the group

had, as a matter of fact, applied for and actually used meeting space in the Student Union on three occasions in October and November of 1971. (Vol. III, p. 9) Professor Oldfather testified that there was no contemplated University disciplinary action against any of the officers of the organization. (Vol. III, p. 10)

On cross-examination, Professor Oldfather testified that there were other groups at the University who were registered, and not recognized by the University, such as Young Democrats, Young Republicans, or various church organizations. (Vol. III, p. 12) Following Professor Oldfather's testimony, one of the attorneys for petitioners indicated that appellants did not intend to offer any evidence. (Vol. III, p. 18) After considering the evidence, and receiving suggested findings of fact and conclusions of law, the District Court filed a Memorandum of Decision denying the relief requested. The Court made the following relevant findings of fact:

> ". . . 2. Since March 22, 1971 plaintiff, Lawrence Gay Liberation Front has applied for and actually utilized meeting rooms at the University of Kansas Student Union for meetings.
>
> 3. The plaintiff, Lawrence Gay Liberation Front, is currently eligible to reserve and utilize meeting room space in the Student Union at the University of Kansas.
>
> 4. Plaintiff is currently eligible to rent office space in the Student Union Building at the University of Kansas.
>
> 5. Currently, plaintiff is eligible to be listed in the University Directory, and will be so listed in the next edition of said Directory if such is requested.

6. Plaintiff is not officially recognized by the administration of the University of Kansas, and is not able to apply for funds from the University.

7. There are currently at the University of Kansas other non-recognized student groups, for example, Young Republicans, Young Democrats, and various church-related groups.

8. *No testimony* was offered indicating any restrictions currently existing with relation to the exercise of First Amendment freedoms by Lawrence Gay Liberation Front or any of its members by virtue of the fact that the organization is not officially recognized . . .

10. *No testimony* was introduced to indicate in any way that the Lawrence Gay Liberation Front and/or any of its individual members have not been able to freely meet, associate, speak or pursue any activities they so choose.

11. *No evidence* or testimony was introduced indicating that the plaintiff has been discriminated against in the exercise of any constitutional right . . .

13. The ability of the Lawrence Gay Liberation Front and that of its members to solicit members, advertise the existence and goals of their organization in the University community, to promote the goals of their organization through personal or printed media, and to meet together in any facility of the University is equal to that of any other registered and non-recognized student organization.

14. As a result of non-recognition, the plaintiff is ineligible to apply to the University for allocation of Student Activity Funds. Only recognized groups are eligible to so apply, and there is no evidence

that recognition would require allocation of Student Funds in any event.

15. *No testimony or other evidence* has been offered to suggest the lack of funds allocated from the Student Activity Fee Fund *has hindered the organization in promotion of the plaintiff.*" (Emphasis supplied) (Vol. I, R. 92-94)

The District Court sustained a motion of the University of Kansas to dismiss the claim against it because the University of Kansas is not a person subject to the jurisdiction of the Federal Court pursuant to the Federal Civil Rights Act. (Vol. I, R. 94) The District Court subsequently entered judgment on the merits for respondents. (Vol. I, R. 97)

The majority opinion of the Circuit Court concluded, *inter alia*, as follows:

"As the trial court found, the plaintiffs did not even attempt to prove the factual basis for their claim, nor did plaintiffs attempt to establish the nature, the purposes of their organization, or anything else in their complaint. . .

"During oral argument before this Court plaintiffs contended that since the trial was consolidated with the hearings on the motions, the Court should have considered the numerous exhibits attached to their complaint and other material as if formally admitted in evidence. Thus counsel presented the matter as if there had been a hearing on the motions and not a full-scale trial. There was, however, a trial on the merits of the motions reserved. The plaintiffs made requested findings and conclusions, as did defendants. The trial court disposed of the case on the merits and this appeal was taken. The trial court was correct in its disposition of the case." Appendix B to the petition, pages 4 and 5.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioners' case as submitted to the trial court following a trial on the merits does not present substantial federal questions.

Throughout the trial and previous appeal of this case petitioners have been proclaiming that constitutional rights were violated by the refusal of officials of the University of Kansas to change the status of their organization from "registered" to "recognized". This is a unique case in that it does not involve normal constitutional questions relating to the refusal to recognize student groups at a state university. The Lawrence Gay Liberation's organization exists and its activities occur on the campus of the University of Kansas. Campus facilities are utilized to implement those rights protected by the First Amendment to the United States Constitution. This case is thus not analogous to *Healy* v. *James*, 408 U.S. 169 (1972), wherein the organization's ability to express itself *was proven* to be seriously curtailed by denial of recognition.

Petitioners' action was brought pursuant to 42 U.S.C. § 1983, alleging that state officials in refusing the "recognized" status denied petitioners their constitutional rights. The case was not heard on motions, but completely tried on the merits. Petitioners introduced no evidence at all on any of the allegations they made. The only evidence that was introduced was presented by respondents. Thus, while petitioners claim that First Amendment freedoms were involved and affected, they introduced absolutely no evidence in support of either position.

No evidence was introduced that Gay Liberation members could not meet and use university facilities. No

evidence was introduced that Gay Liberation members were restricted in circulating their ideas through campus facilities. No evidence was introduced that there were any inhibitions concerning the ability of Gay Liberation members to advocate their ideas. No evidence was introduced that Gay Liberation members could not associate to promote their ideas on campus or off campus. No evidence was introduced that Gay Liberation members could not publish any materials on campus to promote their ideas. No evidence was introduced that Gay Liberation members were discriminated against. No evidence was introduced that Gay Liberation members were punished or treated differently than other students as a result of their circulation or advocacy of ideas or beliefs. The evidence that was presented indicated that Gay Liberation members could in fact use campus facilities as other student groups, use campus mail and printing facilities as other groups, procure office space at the student union as any other group, have meetings on campus and, using university facilities, disseminate ideas on the university campus.

We have summarized briefly what little evidence was presented. Obviously on the basis of the evidence that was presented the District Court was justified in making the conclusions of fact set forth on pages 4-6 of this brief. Thus the District Court was clearly correct in concluding that there was no indication of any restrictions currently existing "With relation to the exercise of First Amendment freedoms by the Lawrence Gay Liberation Front or any of its members by virtue of the fact the organization is not officially recognized." (Vol. I, R. 93)

The District Court made conclusions of law including the following:

> "The plaintiffs did not sustain the burden of proving that the actions of the Chancellor of the University

of Kansas in any way inhibits the First Amendment freedoms as they claim.

"Plaintiffs fail to sustain the burden of proving that any of their First Amendment freedoms have in any way been inhibited by: (a) The fact that the Lawrence Gay Liberation Front is not officially recognized, and (b) The fact that the Lawrence Gay Liberation Front is not eligible for funding from the University. (Vol. I, R. 95)

"Plaintiffs have not sustained the burden of proving that their First Amendment freedoms have been in any way impinged or inhibited. (Vol. I, R. 95)

"Plaintiffs failed to sustain the burden of proving that their inability to be eligible for University funds in any way inhibits their First Amendment freedoms. (Vol. I, R. 95)

"The plaintiffs in this case have not demonstrated that basic constitutional rights are involved in their lawsuit. (Vol. I, R. 96)

"Plaintiffs have not sustained the burden of proving that they have been deprived of constitutional rights by the actions of the Chancellor of the University of Kansas." (Vol. I, R. 96)

Those conclusions are correct. Petitioners seem to believe that having filed a complaint in the District Court, and having appeared in Court in support of that complaint, they should receive a judgment in the absence of presenting any evidence in support of their allegations. However, they have not proven any violations of constitutional rights. There certainly are no substantial federal questions involved that ought to require the attention of this Court. The case was fully tried. What can be concluded from the trial is that plaintiffs did not prove their

case. For the Court to reach a contrary conclusion would require a holding either (a) that the case ought to be retried to give petitioners another chance to present evidence in support of their petition to make up for the lack of evidence the first time, or (b) that they ought to receive judgment as a matter of law because they cannot reserve meeting space in the Student Union for more than seven days or they are not eligible to receive allocations and the use of student fee money which must be approved by university administration, the Board of Regents, and the Legislature of the State of Kansas, even though no evidence was introduced that either of those two situations involved either the exercise of First Amendment freedoms, or a hindrance on the exercise of First Amendment freedoms. Such a ruling is not justified on the basis of this record. The petition should be dismissed without further consideration.

A portion of the petition relates to the action of Judge Templar of the United States District Court for the District of Kansas refusing to admit one of the attorneys for petitioners, Mr. William Kunstler, as a member of the bar of his Court to present a portion of petitioners' case. Of course the application for admission to the bar is not a matter of mere formality; it may in the exercise of judicial discretion be denied. *Spanos* v. *Skouras Theaters Corporation*, 364 F. 2d 161, 167 (2nd Cir. 1966). The only relevant question for purposes of the petition and the ultimate question of whether or not petitioners are entitled to the relief they seek, is whether or not the action that Judge Templar took could have affected the outcome of the lawsuit in any regard. Is there any possibility that the Judge's action regardless of its propriety, could have affected the presentation of petitioners' case? Before petitioners are entitled to relief on the merits, they have to show that any discretion of the trial judge,

if in fact it was abused, prejudiced their case. *Cf.*, *Brown* v. *United States*, 264 F. 2d 363, 366 (D. C. Cir. 1959). Mr. Kunstler told Judge Templar on several occasions that his only part in the presentation of the case was to argue the law. The law was argued, it was argued in the Circuit Court of Appeals, and it is now being argued again. Appellants were represented by counsel of their choice during the evidentiary hearing, although not all the attorneys they wished to have were present. Mr. Klinknett, co-counsel for appellant, was present and was the attorney to whom the entire responsibility of evidentiary matters was entrusted. (Vol. II, pp. 12, 14) Mr. Kunstler's inability to argue the case to the trial court did not in any way affect the presentation of evidence. As a matter of fact there was no presentation of evidence. No evidence was offered at all by petitioners. Even then, the trial court was willing to grant petitioners additional time for preparation of evidence if they wished. (Vol. II, pp. 24, 27) The decision on the merits is still sound, and the ruling by the Circuit Court of Appeals is correct. The petition should not be granted simply because Mr. Kunstler was not allowed to argue the law to Judge Templar.

II. The University of Kansas is not a person and thus cannot be sued pursuant to 42 U.S.C. § 1983.

One of the respondents, and a defendant in the District Court, is the University of Kansas. Pursuant to K.S.A. 1972 Supp. 76-713, the University may be sued in its own name. This is purely a procedural statute. Although procedurally the University could be sued, petitioners' complaint failed to state a cause of action against the University as a defendant under 42 U.S.C. § 1983.

The University of Kansas is an agency of the State of Kansas, and thus is a state instrumentality. (See Plaintiffs' Complaint, p. 3, paragraph 3c, Vol. I, R. 3)

Brennen v. *University of Kansas, et al.*, 457 F. 2d 1287 (10th Cir. 1971); *Board of Regents* v. *Hamilton*, 28 Kan. 376, 378 (1882). The University of Kansas, being a state instrumentality, is not a person for purposes of the Civil Rights Act, 42 U.S.C. § 1983. *E.g., Allison* v. *California Adult Authority*, 419 P. 2d 822, 823 (9th Cir. 1969). Consequently, the District Court lacked jurisdiction over the subject matter of the claims against the University of Kansas and the complaint failed to state a claim upon which relief could be granted as against the University of Kansas. The District Court's decision dismissing the action against the University was correct on this additional ground and should be affirmed.

CONCLUSION

For the foregoing reasons, respondents submit the petition for writ of certiorari should be denied. Trial court's decision was correct. Petitioners simply did not introduce any evidence proving that their constitutional rights were affected by the refusal of the Chancellor of the University of Kansas to grant them "recognition." This case does not present issues involving a "prior restraint" on First Amendment freedoms. Respondents must *prove their own case*. The Constitution of the United States does not require a state university to lend its tacit approval to certain causes. Petitioners also failed to prove that there was any discrimination in the denial of their "recognition." The trial court ruled correctly and was properly affirmed on appeal.

Respectfully submitted,

VERN MILLER
Attorney General State of Kansas
By: EDWARD G. COLLISTER, JR.
Special Assistant Attorney General